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GREYHOUND RENT-A-CAR, INC.,
a Florida Corporation,
Plaintiff-Appellant,

v.

The CITY OF PENSACOLA,
a Florida Municipality; Dollar Rent-A-Car System, Inc., et al., Defendants-Appellees.

No. 81-5243.

United States Court of Appeals,
Eleventh Circuit.

May 28, 1982.

Appeal from the United States District Court for the Northern District of Florida.

Before GODBOLD, Chief Judge, HILL and FAY, Circuit Judges:

JAMES C. HILL, Circuit Judge:

Greyhound Rent-a-Car, Inc. (Greyhound) appeals from an adverse jury verdict rendered in its antitrust suit against the City of Pensacola, Florida (City) and Dollar Rent-a-Car Systems, Inc. (Dollar). For the reasons developed below, we affirm.

I

Greyhound and Dollar are two of five car rental companies who submitted bids for on-airport car rental concessions at the

Pensacola Regional Airport.[1] The City planned to award no more than four concessions to the highest bidders. When the opening of the sealed bids on January 15, 1979 revealed Dollar to be the lowest bidder,[2] Dollar objected that Greyhound was disqualified from bidding because of its failure to meet the performance ability specifications in the bid package. These specifications, carried over from the City's 1968 and 1973 bid packages into the 1978 package, provided in part:

> [I]n order to be qualified to submit a bid, bidder must be capable of providing the following services for its customers at the Pensacola Regional Airport:
>
> (a) National credit card system
> (b) National reservation system
> (c) "Rent-it here, Leave-it there" service.
> (d) Must provide bodily injury and property damage liability insurance as primary coverage and not as excess of customer's liability insurance coverage.
>
> Also, each bidder must have been engaged in the automobile rental business on a national scale for at least five years immediately prior to the date its bid is submitted . . . .

Plaintiff's Exhibit 47 at 4. In particular Dollar asserted that Greyhound had not operated its car rental business "on a national scale" for the immediately preceding five years because

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[1]The three remaining bidders were Hertz Corp., National Car Rental System, Inc., and Avis Rent-a-Car System, Inc.

[2]The Minimum revenue guaranteed to the City by each of the bidders for the five-year period of the concession contracts was: Hertz—$410,000; National—$365,484; Greyhound—$361,081; Avis—$343,716; Dollar—$277,600. Plaintiff's Exhibit 62.

it had rental locations in only five states. Dollar also questioned Greyhound's compliance with the requirements of a national credit card system, a national reservation system, and primary liability insurance coverage. Plaintiff's Exhibit 87. Greyhound responded that it did qualify, contending that its maintenance of offices in Florida, Georgia, Louisiana, and Arizona and its recent expansion into Nevada, California, and Colorado constituted a national scale operation. Plaintiff's Exhibit 89.

After reviewing this dispute and discussing it with the city attorney and the airport manager, the city manager advised a committee of the city council that the specifications in question served the material purpose of insuring "a consistently high level of service to the travelling public ... which combines maximum convenience to the public, uniform ability to provide service throughout the United States, and a common basis for competition among all concessionnaires." Plaintiff's Exhibit 62. On this basis the city manager recommended that Greyhound be disqualified for failure to operate on a national scale and that contracts be awarded to Hertz, National, Avis, and Dollar.

At the city council meeting which followed on February 5, 1979, Greyhound protested that the City's national scale requirement constituted an unlawful restraint on competition. Plaintiff's Exhibit 48 at 9-11.[3] Dollar's counsel advised the City

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[3] Greyhound's counsel referred specifically to a consent decree entered by the Federal Trade Commission against Hertz, National, and Avis prohibiting each of these companies from, *inter alia*, conspiring with competitors to obtain airport car rental bid specifications or concessions contracts containing such requirements as a national credit card system, national reservation system, one-way rental service, operation at a minimum number of airports or for a minimum number of years, and operation on a national scale. The decree further prohibited the companies from recommending the inclusion of these provisions in bid packages and concession agreements. *Hertz Corp.*, 88 F.T.C. 715 (1976).

that it saw no antitrust liability on the part of either Dollar or the City if the City chose to enforce its specifications and reject Greyhound's bid. *Id.* at 5. The city attorney also informed the council that his research had revealed one court decision defining a national operation as one carried on in over half the states.[4]

Concerned about the City's exposure to liability, the council deferred action on the award of bids for two weeks pending further investigation.[5] During this time the city attorney approached Dollar's local counsel about Dollar's indemnifying the City from any lawsuit resulting from invalidation of Greyhound's bid. Transcript, vol. X, Testimony of Don Caton at 50. In response Dollar's vice-president sent a telegram to Dollar's local counsel authorizing him "acting on behalf of Dollar Rent-a-Car Systems, Inc. to enter an indemnification agreement with the City of Pensacola ... [to] indemnify the City from any lawsuits or claims resulting from the rejection of the bid of Greyhound Rent-A-Car by the City of Pensacola." Plaintiff's Exhibit 158. In turn Dollar's local counsel provided the city attorney with a letter reciting his authority to indemnify the City for "all costs and damages which may be assessed against the city in the event the contract ... is awarded to Dollar, and complaint or other form of legal action is taken against the city by reason thereof." Plaintiff's Exhibit 157. Finally on February 22, 1979, the council voted, without any

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[4] Theretofore the meaning of the specification requiring operation "on a national scale" had not been defined.

[5] The councilman who moved to postpone action on the matter expressed his concern this way: "[B]asically we look like we are looking at a law suit either way we want to go, ... and I just think we ought to take a look at it..." Plaintiff's Exhibit 48 at 21.

discussion of indemnification,[6] to award the concession contracts to Hertz, National, Avis, and Dollar. Plaintiff's Exhibit 50 at 27.

Greyhound subsequently commenced this suit under § 1 of the Sherman Act, 15 U.S.C. § 1, on the theory that Dollar and the City had contracted, combined, or conspired to exclude it from being awarded a car rental concession at the airport. According to Greyhound, the evidence it adduced at trial established a boycott within the pattern of *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed.2d 741 (1959), a restraint which the Supreme Court has condemned as a per se violation of the Sherman Act.[7] On appeal Greyhound complains of the district court's submission of the case to the jury under a rule of reason rather than a per se instruction and, even if a rule of reason instruction was warranted, of error within the charge given. Greyhound further attacks two evidentiary rulings made by the trial judge: (1) the admission of the city attorney's testimony that he found no evidence of an antitrust violation by the City, and (2) the exclusion of an exhibit indicating Dollar's increase of its bid after learning there were five, rather than four, bidders.

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[6] The city attorney testified that he did not bring the existence of any indemnity agreement to the councilmen's attention before they voted. Transcript, vol. X, Testimony of Don Caton at 83-84. The minutes of the council meeting also reveal no discussion of indemnification. Plaintiff's Exhibit 50.

[7] In *Klor's* the Supreme Court held that a group boycott forbidden by the Sherman Act was stated by the allegations of the plaintiff retail store that national appliance manufacturers had conspired among themselves and with the plaintiff's retail competitor not to sell to plaintiff or to sell only on unfavorable terms.

We affirm the entry of judgment against Greyhound because we conclude there was insufficient evidence to establish any contract, combination, or conspiracy between Dollar and the City within the meaning of § 1 of the Sherman Act. Greyhound having failed to prove the first element of its § 1 claim, we need not therefore address the challenges it presents to the jury instructions and to the admission and exclusion of evidence unrelated to the issue of agreement.

II

United States v. Colgate & Co., 250 U.S. 300, 307, 39 S.Ct. 465, 468, 63 L.Ed. 992 (1919), established that the Sherman Act does not restrict the right of a trader "freely to exercise his own independent discretion as to parties with whom he will deal" and to announce in advance the terms on which he will deal. Hence the right of the City in this case to deal only with parties who meet certain specifications that the city deems material and to refuse unilaterally to deal with Greyhound if it fails to comply with these specifications cannot be questioned.[8] Greyhound contends, however, that this case presents something more than the City's individual refusal to deal with it. Although *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed.2d 741 (1959), indicates that an individual refusal to deal may violate the Sherman Act when it is supported by an agreement with the victim's competitor, we cannot find in the record evidence of an agreement between the City and Dollar within the meaning of the "contract, combination . . . or conspiracy" language of § 1 of the Sherman Act.

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[8] On appeal Greyhound has not pursued the argument that the "national scale" requirement, standing alone and apart from its use as a result as a conspiracy, offends antitrust laws. We do not address that question.

The essence of a contract, combination or conspiracy which is condemned by § 1 is an agreement or mutual commitment to engage in a common course of anticompetitive conduct. As Professor Sullivan states: "The bottom layer of the analysis is always the finding that concerted action did occur, that conspirators ... came to terms on a common course to be concertedly followed." L. Sullivan, *Handbook of the Law of Antitrust* § 109 at 313 (1977). The facts of this case raise three possible theories for alleging a concert of action or conspiracy between the City and Dollar. Each is unavailing for Greyhound.

First, had Dollar induced the City to insert the national specifications in the bid packages, Greyhound could have cleared at the least the first hurdle of its § 1 claim.[9] Similarly if Dollar had induced the City to adopt a definition of "national scale" that would automatically disqualify Greyhound as a bidder, the element of combination would be satisfied. But evidentiary support for either of these theories is lacking. There is clear, uncontradicted testimony that the City had no discussion or contact with any of the bidders regarding use of the national specifications. Transcript, vol. XII, Testimony of Edmond R. Hinkle at 168-69; Depositions, vol. IX, Deposition of Gary Paxton at 83, 94-95; Transcript, vol. XIII, Testimony of James Reeves at 352. Furthermore, the definition of operating on a "national scale" as requiring business in more

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[9] We do not comment on whether such a conspiracy would constitute an unlawful restraint of trade. *Cf. In Re Airport Car Rental Antitrust Litigation*, 521 F.Supp. 568 (N.D.Cal. 1981), *appeal docketed*, No. 81-4399 (9th Cir. Aug. 5, 1981) (*Noerr-Pennington* doctrine precludes liability for agreement between airport officials and rental car companies regarding eligibility requirements and terms of concession contracts).

than half the states was solely the product of the city attorney's independent research. Transcript, vol. X, Testimony of Don Caton at 36, 77.

The most promising theory, and the one on which Greyhound relies, is that the indemnity agreement between Dollar and the city reflects the defendants' commitment to a common course of action, namely the City's exclusion of Greyhound and award of a contract to Dollar in exchange for Dollar's payment of any damages and costs incurred in legal proceedings arising from the City's actions.[10] Greyhound

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[10] Apparently there is some dispute between the defendants regarding Dollar's agreement to indemnify the City. According to the city attorney's testimony, the City regarded the letter of Dollar's local counsel reciting his authority to indemnify the City (Plaintiff's Exhibit 157) as sufficient evidence of Dollar's obligation at the time of the letters received. After this litigation commenced, however, the city sought to formalize the indemnity agreement. The city attorney prepared a rought draft of a proposed agreement and sent it to Dollar. Transcript, vol. X, Testimony of Don Caton at 56. Dollar's vice-president, who testified to receiving this document, refused to sign it. *Id.*, Testimony of Gary Paxton at 63. This document was the subject of a request for production and subsequently of Greyhound's motion to compel production and for sanctions. Both the city attorney and Dollar's vice-president testified that they had not retained, and could not locate, a copy of that document. *Id.*, Testimony of Don Caton at 57-58; Testimony of Gary Paxton at 65.

We do not purport to resolve any questions regarding the enforceability of Dollar's agreement to indemnify or the extent of Dollar's obligation. For purposes of our inquiry into the existence of a contract, combination, or conspiracy, we note only that it is undisputed that *some* kind of agreement exists. Dollar's vice-president ackowledged the existence of some "understanding" with the City regarding indemnification, although he disputed the existence of an "agreement" regarding the details. *Id.*, Testimony of Gary Paxton at 61. Moreover, the City judicially admitted under Rule 36 that "Dollar agreed to indemnify, hold harmless or otherwise protect the city from litigation that Greyhound might file if its bid were rejected." *Id.*, vol XI, at 76.

would have us view the indemnity agreement as reading in effect: "For and in consideration of Dollar's promise to indemnify, the City hereby promises to reject the bid of Greyhound Rent-a-Car." This interpretation of the agreement cannot be supported by either the language of the agreement or by any inference drawn from the City's subsequent decision to disqualify Greyhound's bid.

The language of the agreement reveals that the City did not commit itself either to reject Greyhound or to any other particular course of action. It was Dollar which committed itself to certain conduct—namely indemnification of the City *in the event that* the City chose, for whatever reason, to reject Greyhound and litigation ensued.[11] Furthermore, there is nothing in the record to suggest that the City Council's ultimate decision to reject Greyhound was induced or supported by the indemnity agreement with Dollar. It is true that a city councilman initially voiced concern about the City's potential liability and the desirability of indemnification at the February 5 council meeting. Plaintiff's Exhibit 48 at 21. There is no indication, however, that the council charged the city attorney with the task of entering into a bargain with Dollar for indemnification. Moreover, there is uncontradicted testimony that the councilmen were not informed of an indemnity agreement prior to their vote on February 22, Transcript, vol. X, Testimony of Don Caton at 83-84, and that the councilmen were swayed by their view that the national scale specification was a material requirement necessary to ensure convenient and reliable service to the travelling public. Transcript, vol. XIII, Testimony of James Reeves at 352-54; *id.*, testimony of Albert

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[11] Again we caution that we express no views on the legal enforceability of Dollar's obligation. Our coment is directed solely to the language of Plaintiff's Exhibit 157 insofar as it is pertinent to finding a contract, combination, or conspiracy between the defendants. *See* note 10 *supra*.

Klein, Jr. at 387-88; *id.*, Testimony of Franklin Pryor at 396-97; *id.*, Testimony of Harold Rose at 401-02, 404-05. The indemnity agreement therefore does not reflect a mutual commitment by the City and Dollar to exclude Greyhound. In short, it does not evidence the defendant's coming to terms on a common course of action to be concertedly followed.

In light of the lack of evidence to establish a contract, combination, or conspiracy within § 1 of the Sherman Act, the judgment of the district court in favor of Dollar and the City is

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-5243

U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FILED AUGUST 2, 1982

Norman E. Zoller
Clerk

GREYHOUND RENT-A-CAR, INC.,
a Florida Corporation

Plaintiff-Appellant,

versus

THE CITY OF PENSACOLA,
a Florida municipality;
DOLLAR RENT-A-CAR SYSTEMS, INC.,
ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Florida

ON PETITION FOR REHEARING

( )

Before GODBOLD, Chief Judge, HILL and FAY, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

James C. Hill
United States Circuit Judge

UNITED STATES DISTRICT COURT

for the
Northern District of Florida

Pensacola Division

CIVIL ACTION FILE NO. PCA 79-0489

GREYHOUND RENT-A-CAR, INC.,

vs.

THE CITY OF PENSACOLA, a Florida municipality; et al.,

JUDGMENT

This action came on for trial before the Court and a jury, Honorable Winston E. Arnow, Chief, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged that the plaintiff take nothing, that the action be dismissed on the merits, and that the defendants The City of Pensacola and Dollar Rent-A-Car recover of the plaintiff Greyhound Rent-A-Car, Inc. their costs of action.

Dated at Pensacola, Florida, this 30th day of October, 1980.

OFFICE OF THE CLERK
U.S. DISTRICT COURT
NORTH DISTRICT, FLORIDA
PENSACOLA, FLORIDA

FILED OCTOBER 30, 1980, 11:30 AM

MARVIN S. WAITS
Clerk of Court

By: Bruce McMirideni
Deputy Clerk

TELEGRAM

IPMPCFA PNS
4-038731 EO52 02/21/79
ICS IPMRNCZ CSP
2137768100 TDRN LOS ANGELES CA 56 02-21 0206P EST
PMS HENRY BARKSDALE, ATTY AT LAW, DLR
1014 EAST MALLORY ST
PENSACOLA FL 32503

Confirming our conversation of today I hereby authorize you acting on behalf of Dollar Rent A Car Systems Inc to enter an indemnification agreement with the City of Pensacola. Such agreement will indemnify the city from any lawsuits or claims resulting from the rejection of the bid of Greyhound Rent A Car by the City of Pensacola.

Gary Paxton, Vice President, Dollar Rent A Car Systems Inc

1408 EST

HENRY R. BARKSDALE, P.A.
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February 22, 1979

Honorable Don J. Caton, City Attorney
City of Pensacola
City Hall
Pensacola, Florida 32501

Re: Bid of Dollar Rent A Car Systems, Inc.

Dear Don:

In accordance with our recent conversation enclosed is a copy of the July 13, 1976 Consent Order by the Federal Trade Commission against Hertz Corporation, et al, which we discussed recently.

As you can tell by reading this Consent Order Mr. Don Tucker representing Greyhound Rent A Car has mislead the City Council as to the contents thereof. This order was entered in the matter of Hertz Corporation, Avis Rent A Car, and National Car Rental System ordering them not to conspire with each other to dictate to municipalities or authorities the terms of the bid specifications or other matters contained in said order. It does not condemn the requirement by a municipality or authority as to the terms of the bid specifications, as long as these three, known as the "Big Three" in the car rental chain, do not conspire with each other or a competitor to require the terms set forth in the order. I am certain that this has not been done with the City of Pensacola.

I have been authorized by Mr. Gary Paxton, Vice-President of Dollar Rent A Car Systems, Inc. to enter an Indemnification Agreement on behalf of Dollar Rent A Car Systems, Inc. to pay all costs and damages which may be assessed against the city in the event the contract for automobile concession at the Pensacola Municipal Airport is awarded to Dollar, and complaint or other form of legal action is taken against the city by reason thereof.

It is my understanding that some question has been raised by Greyhound that in view of the fact that Dollar Rent A Car System, Inc. does not have automobiles listed in their name but only in the franchisees name that they are not, therefore, a national organization and not operating on a national scale. If we adopt this conclusion then it could be said that not even McDonald's Hamburgers are a national organization, and I do not believe anyone would make a serious contention of this fact.

Dollar operates in approximately 45 states thru franchise holders who perform under the auspices of the national organization and subject to the terms of the Franchise Agreement. Dollar Rent A Car Systems, Inc. signed the bid and is responsible for the performance of the contract. Merely not having the automobile titled in the name of the parent corporation does not in any way mean they are not operating on a national scale.

I trust this is the information you desire.

Yours very truly,

Henry R. Barksdale

HRB/sm
Enclosure

EXTRACT FROM PAXTON TRIAL TESTIMONY

* * *

Q. [By Mr. VanDercreek] Do you have a written indemnity, hold-harmless or similar agreement with the City of Pensacola pertaining to this present antitrust action which has been instituted by Greyhound against Dollar, Sea Bear and the City of Pensacola?

A. [By Mr. Paxton] We have an understanding with the city that's been put into evidence already. I don't consider that an agreement.

Q. On - when your deposition was taken in this case, you were asked that question and you said no, is that correct?

A. That's correct. I just gave you the same answer.

Q. Well, at this time you said you had an understanding and there you said no.

A. No, we don't have an agreement.

THE COURT: What's the difference between an understanding and an agreement?

A. Well, I've had an understanding with my wife I was going to buy her a new car but we haven't agreed it's to be a Cadillac or Datsun, Your Honor. We've got an understanding but haven't agreed to the details.

THE COURT: What you're saying is that you have an understanding with the city that you will indemnify them on this litigation but haven't agreed to the details? Is that what you're saying?

A. That's correct.

* * *